No. 93-6497

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

Respondent the State of Texas (the "State") fails to address directly the two factors that weigh most heavily in favor of granting the petition.

First, the Fifth Circuit's decision in this case is in direct conflict with the decision of the Ninth Circuit in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, 111 S. Ct. 1778 (1992). The conflict goes far beyond a technical dispute over the wording of a statute -- these two circuits have entirely different approaches toward the role that counsel should play in the investigation and

preparation of federal habeas claims. The Fifth and Ninth Circuits together account for 38 percent of the inmates currently on death row in the United States and 47 percent of all executions carried out since 1977.[1] As long as this conflict remains, the degree to which death row prisoners will have the assistance of counsel to prepare their federal habeas petitions will depend entirely upon the happenstance of the federal court to which they can make application. The State fails to mention this conflict (or even cite Brown).

Second, even if there were no clear-cut conflict among the lower courts, this case presents issues of such great importance that they warrant this Court's immediate attention. The overarching issue in this case is whether state death row prisoners can be executed before they have any meaningful opportunity to obtain counsel to assist them in the preparation of post-conviction petitions for relief. This case squarely presents the counterpoint to the facts that were critical to Justice Kennedy's concurrence in Murray v. Giarratano, 492 U.S. 1 (1989) -- i.e., that none of the death row prisoners involved in that case "has been unable to obtain counsel to represent him in post-conviction

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[1] Death Row U.S.A., NAACP Legal Defense and Educational Fund (Fall 1993).

proceedings." 492 U.S. at 14 (Kennedy, J., concurring in judgment). Moreover, this case raises for the first time in this Court the issue of whether the right to counsel under federal statutory law extends to assistance in the investigation and preparation of federal habeas claims.[2]

These issues would be important even if they applied only to a single death row prisoner. But they do not. This case is the precursor to a potential tidal wave. An authoritative study done for the Texas state bar recently described the problem of finding counsel to represent death row prisoners in post-conviction proceedings in Texas as "desperate," due to an "overwhelming" number of cases and the increasing difficulty of finding volunteer counsel, "particularly when cases are under an active execution warrant."[3] Several prisoners besides Mr. McFarland have execution dates set in the coming weeks and are likewise

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[2] Given the extent to which state and federal habeas proceedings are intertwined, this petition and the petition in No. 93-6483, which addresses the failure of the State to provide Mr. McFarland with counsel in state habeas proceedings, raise closely related issues. Mr. McFarland suggests that both petitions be granted and the cases consolidated for purposes of briefing and oral argument.

[3] A Study of Representation in Capital Cases in Texas, by the Spangenberg Group (hereinafter "Report") at ii-iii (1993) (attached to the Petition for Writ of Certiorari in No. 93-6483 as Appendix C).

without counsel.[4] Thus, the issues raised by Mr. McFarland are "systemic," Report at xiii, and, until they are resolved, they will be presented repeatedly to this Court in petitions for certiorari and applications for stays of execution.

BACKGROUND

In view of certain statements made in the State's Opposition,[5] it is important to set out clearly for the Court the context in which this case arises.

The evidence is overwhelming that there is a crisis in post-conviction representation in Texas. It is thoroughly documented in the Texas Bar study, which made several findings that are pertinent here:

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[4] See Letter of Mandy Welch to United States District Court for the Northern District of Texas, dated October 22, 1993, at 2.

[5] This is not, as the State contends, a case in which there has been either "the most abysmal lack of record keeping" by the Texas Resource Center or "an attempt to manipulate the appearance of a 'crisis of representation' when in fact none exists . . . ." Br. Opp. at 17. The State cites to nothing to support these harsh allegations except the unremarkable facts that Mr. McFarland no longer has the lawyer he had on direct appeal, that Mr. McFarland has had occasional contacts with the Texas Appellate Defense and Educational Resource Center (the "Resource Center") and that several months have passed since this Court denied his certiorari petition. Id. Neither the district court nor the court of appeals relied in any way on the State's allegations, and therefore they have no place being asserted here.

- "the problems in Texas far outweigh those in any other death penalty state in the country" (Report at iii);
- "Texas has the largest death row population of any state in the country" (id. at iv);
- "the large number of cases with approaching dates of execution makes the problem most acute at this time" (id. at ii);
- "Texas is the only death penalty state in which representation in capital cases is provided almost exclusively by private counsel and primarily not by public defender programs" (id. at v);
- "Despite the fact that . . . the Code of Criminal Procedure in Texas gives the district court judges discretion to appoint counsel and to compensate them in state habeas proceedings, this is almost never done" (id. at vii) (emphasis added);
- "Texas is running out of volunteer lawyers and law firms willing to provide pro bono . . . representation in capital cases at state habeas" (id. at viii); and
- "[I]t is our professional view that representation in the state habeas cases in Texas has gone beyond the crisis level and requires immediate attention" (id. at ix).

This desperate situation has been several years in the making. Judge Edith Jones of the Fifth Circuit wrote in September 1990 that, while she had not to that point known of a defendant who was executed without the benefit of representation by counsel, "it must be recognized that the growing death row population requires increased counsel resources, while the present system discourages the appointment of counsel." Hon. Edith Jones, Death Penalty Proce-

dures: a Proposal for Reform, 53 Tex. Bar J. 850, 851 (1990). She noted that the State's practice of setting execution dates shortly after direct appeal is exhausted rarely provides enough time, on the first petition, "to permit preparation by defense counsel or thorough and adequate review by state and federal courts." Id. And she considered it "self-evident[]" that the State's failure to provide remuneration "discourages attorneys from representing capital defendants in the state habeas proceeding that is required before federal collateral review can be had." Id.

Thus, the fact that Mr. McFarland has been unrepresented since his certiorari petition was denied is a symptom both of the State's effort to impose what Judge Jones called "[d]ocket control by execution date," id., and the State's failure to provide any meaningful legal assistance in post-conviction proceedings. In the past, that failure was overcome by various stop-gap measures. The particular facts of Mr. McFarland's case, described below, demonstrate that such measures can no longer be counted upon to fill the gap.

This Court denied Mr. McFarland's petition for writ of certiorari on his direct appeal on June 7, 1993. McFarland v. Texas, 113 S. Ct. 2937 (1993). Two months

later (on August 16, 1993), the trial court set his execution for September 23. Mr. McFarland then filed a pro se petition with both the trial court and the Texas Court of Criminal Appeals asking that his execution be stayed so that the Resource Center would have sufficient time to recruit counsel. The trial court granted the request "in part" by rescheduling the execution date for October 27. Throughout this period, the Resource Center encountered the reality recognized by Judge Jones and documented in the Texas Bar study: Despite its best efforts, the Resource Center could not recruit counsel for a client who was facing imminent execution.[6]

Thus, on October 21, Mr. McFarland, with the assistance of the Resource Center, filed another pro se petition with both the state trial and appellate courts requesting a stay of sufficient duration "to ensure that I

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[6] The State implies that the Resource Center can and should assume the representation of all death row prisoners who do not otherwise have counsel. But the Resource Center is not a public defender service. While it has devoted some of its limited resources to the representation of death row prisoners, its principal functions are to recruit private attorneys and to provide legal and administrative support to those attorneys. See Report of the Judicial Conference of the United States to the House and Senate Judiciary Committees, 53 Crim. L. Rep. (BNA) 2003, 2013-14 (1993). It is not possible for the Resource Center to represent all of the more than 70 prisoners on Texas' death row who currently have no lawyer.

have meaningful access to legal representation . . . ." That request was promptly denied by both courts. In dissent, Judge Clinton of the Texas Criminal Court of Appeals noted that it was time for the Texas courts to "confront headon 'the crisis stage in capital representation' in this State."[7] A petition for writ of certiorari to the Texas Court of Criminal Appeals, a Motion to Stay Execution and a Motion to Proceed In forma Pauperis was filed with this Court in No. 93-6483 on October 25, 1993.

In the meantime, Mr. McFarland, with the assistance of the Resource Center, filed with the United States District Court for the Northern District of Texas on October 21 pro se motions for a stay of execution and appointment of counsel. The Resource Center submitted letters to the court again describing its efforts and inability to find counsel to represent Mr. McFarland. These motions were denied on October 25, two days before the scheduled execution, on the ground that the court had no jurisdiction to enter a stay or appoint counsel until a proceeding had been instituted by the filing of a habeas petition.

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[7] Ex Parte McFarland, Writ No. 25,518-01 (Tex. Crim. App., Oct. 22, 1993)(Clinton, J., dissenting)(attached to Motion to Supplement Appendix A of Petition in No. 93-6483).

On appeal, the Fifth Circuit, at approximately 6 p.m. on October 26, also denied relief, giving three principal grounds: (1) a stay cannot be issued under 28 U.S.C. § 2251 until a habeas petition is filed; (2) there is no constitutional right to a lawyer in post-conviction proceedings, and (3) in the absence of a habeas petition, Mr. McFarland had made no showing of a "substantial case on the merits," which it deemed a prerequisite to the issuance of a stay under Barefoot v. Estelle, 463 U.S. 880 (1983).[8] A petition for writ of certiorari and application for stay were then lodged with this Court, which at 11:51 p.m. central time issued a stay pending action on the certiorari petition.

In the meantime, Danny D. Burns, a Fort Worth lawyer not recruited by the Resource Center, was contacted by district court personnel earlier in the day on October 26 and told that the court might grant a stay if he were to file a document denominated as a habeas corpus "petition" and agree to represent Mr. McFarland. Mr. Burns notified the Resource Center of this contact. Until that point, the

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[8] The Fifth Circuit failed to address Mr. McFarland's arguments that (1) the court had authority to issue a stay under 28 U.S.C. § 1651(a), the All Writs Act, and the U.S. Constitution; and (2) Mr. McFarland had a statutory right to counsel under 21 U.S.C. § 848(q)(4)(B).

Resource Center had advised Mr. McFarland against filing any kind of perfunctory "petition" designed merely to vest the court with jurisdiction because of the recent experience of another unrepresented death row inmate in Gosch v. Collins, No. SA-93-CA-731 (W.D. Tex.). In that case, the federal court in San Antonio had denied on the merits a perfunctory habeas petition that had been filed simply to eliminate any question that the court had jurisdiction to issue a stay[9] and, in doing so, created the risk that any subsequent petition would be barred under Rule 9(b) of the Habeas Corpus Rules. To avoid such a result, the Resource Center advised Mr. McFarland to file a pre-petition motion for stay and appointment of counsel, a procedure that was objected to by the State of Texas but was approved by the Ninth Circuit in Brown v. Vasquez.

However, when it became apparent late on October 26 that there was a substantial risk that both the Fifth Circuit and this Court would fail to issue a pre-petition stay, Mr. Burns and the Resource Center decided that a perfunctory habeas petition might be Mr. McFarland's last chance. The court this time accepted jurisdiction but still

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[9] The Fifth Circuit affirmed that dismissal. That case is now before this Court on a petition for writ of certiorari in No. 93-6025.

denied the stay, finding that the perfunctory petition (not surprisingly) did not set forth a substantial case on the merits under Barefoot. On appeal, a divided panel of the Fifth Circuit issued a stay -- by coincidence at exactly the same minute as the stay issued by this Court in this case.

Two days later, Mr. Burns dismissed the habeas petition under Fed. R. Civ. P. 41(a), explaining that if Mr. McFarland proceeded on that petition, he would risk "being deprived of a meaningful opportunity to litigate all meritorious challenges to his conviction and death sentence not raised in the petition . . . ." Mr. McFarland has notified the Fifth Circuit of the dismissal, but he maintains that it did not moot the issues on appeal. On November 15, 1993, the State asked the Fifth Circuit to dismiss the appeal as moot.

This procedural history, while clearly tortured, hardly supports the State's suggestion that there has been an effort to manipulate the system. Instead, Mr. McFarland's three cases (No. 93-6483, No. 93-6497 and the case in which a habeas petition was filed, now pending in the Fifth Circuit) together graphically illustrate the procedural morass now being thrust upon litigants and the courts by the crisis in capital representation in Texas. Mr. McFarland submits that adoption here of the approach endorsed by the

Ninth Circuit in Brown v. Vasquez would cut through that morass. But, whether that approach is adopted or not, it should be apparent that this case raises important issues on which the lower federal courts need guidance from this Court.

I. REVIEW SHOULD BE GRANTED TO ELIMINATE CONFLICT.

The certiorari petition describes in some detail that the Fifth Circuit's decision here could not be more in conflict with the Ninth Circuit's decision in Brown. In addition, the Eleventh Circuit, in In re Lindsey, 875 F.2d 1518 (11th Cir. 1989), has decided a closely related issue that puts that circuit in apparent conflict with the Ninth Circuit as well.[10] Thus, the three federal circuits with the largest death row populations are split 2-1 on the fundamental issue of whether the federal stay and appointment-of-counsel statutes can be invoked before a federal habeas petition is filed.

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[10] In that case, the court did not address the precise issue decided in Brown and in this case -- whether a death row prisoner could invoke § 2251 to obtain a stay before filing a habeas petition. But it did address whether counsel could be appointed under 21 U.S.C. § 848(q)(4)(B) to assist in the preparation of a habeas petition that had not yet been filed. The court read that statute in the same narrow way that the Fifth Circuit here interpreted § 2251, ruling that a habeas petition -- the very pleading the prisoner said he needed to assistance of counsel to prepare -- had to be filed first.

The different interpretations given to these statutes in these circuits result in profound differences in the quality and quantity of legal representation available to death row prisoners in these circuits. However the Court might feel about how this conflict should be resolved, it is clear that it requires resolution. Federal courts should not continue to dispense fundamentally different justice depending upon where they sit.

II. REVIEW SHOULD BE GRANTED TO DECIDE IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Even if no conflict between circuits existed, the Fifth Circuit's decision in this case raises important questions that this Court should resolve. The Fifth Circuit's decision has far broader implications for the administration of federal habeas than appears on the face of the narrowly drawn decision. If that decision is left in place, the issue of whether executions should be stayed so that meaningful assistance of counsel can be obtained will not go away.

If an unrepresented prisoner cannot obtain counsel and a stay of execution from a federal court before a habeas petition is filed, his only other choice is to attempt to file such a petition and then request a stay and the assis-

tance of counsel. Compare Br. Opp. at 11. There can be little question that such a "petition" would have to be perfunctory. Mr. McFarland has stated in this case that he "lack[s] the training and knowledge" to file a habeas petition -- a fact that would apply to virtually all death row prisoners. See Giarratano, 492 U.S. at 14 (Kennedy, J., concurring) ("[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law").

Until recently, the Texas Resource Center has responded to the State's assertion that a habeas petition is necessary to give a federal court jurisdiction to issue a stay by filing on behalf of unrepresented prisoners a perfunctory petition with the stay application. If such a petition were filed, then the State would agree not to object to the issuance of a stay. The federal judges in Texas then would routinely grant stays for a reasonable period (typically 120 days) to give the petitioners an opportunity for counsel to be recruited and to investigate their cases.[11] At the completion of the investigation, coun-

[11] See, e.g., Sterling v. Collins, No. 3-93CV0147-G (N.D. Tex., Jan. 22, 1993); Hernandez v. Collins, No. CA-L-92-11 (S.D. Tex., Aug. 20, 1992); Mooney v. Collins, No. (continued...)

sel would be given leave to amend the perfunctory petition to add all meritorious claims.

This stop-gap arrangement was upset in the Gosch case mentioned above, when the district court there, despite the state's lack of objection, reviewed and dismissed the perfunctory petition on its merits and denied a stay on the eve of the petitioner's execution. The Fifth Circuit affirmed that dismissal. And the Fifth Circuit's decision in this case, while not addressing exactly the same issue, lends further weight to the conclusion that a stay of execution to allow time for counsel to be obtained and to investigate the case will not be granted unless the petitioner can somehow put together on his own not just a perfunctory habeas petition but one that asserts a substantial case on the merits. Moreover, under the Gosch approach, if the unrepresented petitioner's initial habeas petition is dismissed but he somehow escapes the executioner long enough to find a lawyer and file a new petition, it too will be dismissed, this time as an abuse of the writ under McClesky -- no matter how meritorious its claims might be.

[11](...continued)
6:92CV254 (E.D. Tex., Apr. 30, 1992); Caldwell v. Collins, No. 3-92CV1316-P (N.D. Tex., June 30, 1992).

Procedures this Byzantine and results this perverse on their face raise questions regarding whether they are permitted by the Constitution or were intended by Congress. While this Court has stated that a death row prisoner has no constitutional right to counsel in most post-conviction proceedings,[12] it has also said that such prisoners do have a constitutional right to "meaningful access" to such proceedings.[13] Moreover, Congress has created a statutory right to counsel in federal habeas cases, a factor that this Court has never before considered. Given this legal backdrop, the execution of a death row prisoner -- before he has even had any meaningful assistance of counsel to determine whether he has valid post-conviction claims -- raises issues so fundamental and novel that they warrant review by this Court.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and in this Reply, Petitioner Frank Basil

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[12] See, e.g. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991); but see id. at 2567-68.

[13] Bounds v. Smith, 430 U.S. 817 (1977).

McFarland respectfully requests that the Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of the Court, that all parties required to be served have been served one copy of the foregoing Petitioner's Reply Brief (in No. 93-6497) by first class mail, postage prepaid, to wit:

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Dated: November 19, 1993